UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 14 CR 0517 (AJN)

HENRY CEPEDA,

Defendant.

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New York, N.Y.
March 6, 2015
12:06 p.m.

Before:

HON. ALISON J. NATHAN

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
GINA CASTELLANO
Assistant United States Attorney

LAW FIRM OF ROBERT OSUNA, P.C.
Attorney for Defendant
ROBERT A. OSUNA
RICHARD CAMPISI

(In open court; case called)

MS. CASTELLANO: Good afternoon, your Honor.

Gina Castellano for the government.

THE COURT: Good afternoon.

MR. OSUNA: Robert Osuna for Mr. Cepeda.

Good afternoon, your Honor.

MR. CAMPISI: Richard Campisi also with Mr. Cepeda, with the Office of Robert Osuna.

THE COURT: Good afternoon, counsel. And good afternoon, Mr. Cepeda. Please be seated.

We're here today for sentencing in United States v. Henry Cepeda, 14 CR 517.

In preparation for today's proceeding I have reviewed the presentence report which is dated February 17, 2015.

I've also received and reviewed the following additional submissions. I have the defendant's submission which is dated February 26, 2015. It includes exhibits at the back. Exhibit A is a letter from Mr. Cepeda's wife. Exhibit B is a series of certificates of achievement from the Bureau of Prisons or the MCC and the like. Exhibit C is a letter from a fellow inmate of Mr. Cepeda's who is working with him on his educational classes, his GED classes. Exhibit D is a birth certificate of Mr. Cepeda's son. Exhibit E is a marriage certificate of Mr. Cepeda. Exhibit F is a news clipping related to the arrest of Mr. Cepeda's father. Exhibit G is an affidavit of paternity from his father. And Exhibit H consists of a series of high school records of Mr. Cepeda's.

Then in addition I have the prosecutor's submission which is dated March 3, 2015.

Let me confirm that you've received each other's submissions and to inquire as to whether there are any additional submissions that I should have in front of me for purposes of sentencing.

MR. OSUNA: Your Honor, there's nothing from our side. We've received Mr. Kamaraju's submission and are ready to proceed.

MS. CASTELLANO: Nothing else from the government.

THE COURT: Let's turn to the presentence report. Mr. Osuna, I know that you have, but let me confirm for the record that you've read the presentence report and discussed it with your client.

MR. OSUNA: Yes, your Honor, we have.

THE COURT: And Mr. Cepeda may I confirm that you've had an opportunity to review the presentence report and go over it with your attorney.

THE DEFENDANT: Yes, I have.

THE COURT: And the opportunity to raise any errors in the report with him? Have you had that opportunity?

THE DEFENDANT: Yes.

THE COURT: Mr. Osuna, you had noted some errors in the report that were or were not transmitted to -- these were minor things, I believe -- any errors in the report that were not transmitted to probation?

MR. OSUNA: No, your Honor. There were just two minor, minor errors. Nothing that would stop us from proceeding here today.

THE COURT: Anything you want corrected for purposes -- since the report will go to BOP?

MR. OSUNA: We should just correct his home address where he will be living if he's on supervised release.

THE COURT: Remind me of the page.

MR. OSUNA: It's on page eleven, paragraph 56. Instead of apartment 25C it should be apartment 25D.

THE COURT: Thank you. We'll make that correction. Page 11, paragraph 56, changing 25C to 25D.

Anything else?

MR. OSUNA: Judge while we're at it, paragraph 50 on page ten, his mother's name is Janet not Janice. J-A-N-E-T. That would be all.

THE COURT: Thank you.

Paragraph?

MR. OSUNA: I believe it's paragraph 50, Judge, on page ten.

THE COURT: Yes. Changing Janice to Janet.

My deputy noted too, I believe, so on the -- well the first page of the PSR itself or the second page, if you include the cover letter, for offense, it lists the offense as Count One. I believe it's Count Two.

Do I have that right, Mr. Osuna?

MR. OSUNA: Yes. That would be correct.

THE COURT: So we'll make that change to the report and I think that error was just repeated on page 18 when probation lists the supervised release terms and the custody terms, it says Count One but it's -- and the fine, it lists Count Two that Mr. Cepeda pled to. So we'll make that change.

Let me ask, Mr. Osuna. Other than my matters that we've just discussed, and putting aside for a moment the calculation of the Sentencing Guidelines, are there any objections to the report regarding the factual accuracy?

MR. OSUNA: No, your Honor.

THE COURT: And let me ask Ms. Castellano the same question.

MS. CASTELLANO: Nothing, your Honor.

THE COURT: I did want to ask in the government's submission, I know you're not the author, Ms. Castellano, but page three, the paragraph right at the top it says Criminal History Category III but I believe everyone agrees it's Criminal History Category II.

MS. CASTELLANO: That's correct, your Honor. And it's correct in the next paragraph.

THE COURT: Thank you.

Hearing no objections to the factual accuracy of the presentence report, the Court will adopt the factual recitation set forth in the presentence report. The report will be made part of the record in this matter and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report without further application to this Court.

Turning to the Sentencing Guidelines. As counsel is aware, I am no longer required to follow the United States Sentencing Guidelines but I am still required to consider the applicable guidelines in imposing sentence and must therefore accurately calculate the sentencing guideline range. In this case there was a plea agreement to which the parties stipulated to a particular calculation in the Sentencing Guidelines.

May I ask both counsel if I'm correct that the calculation in the presentence report is in accord with the agreement and if there are any objections.

Ms. Castellano?

MS. CASTELLANO: It's the same, your Honor. No objections.

THE COURT: Mr. Osuna?

MR. OSUNA: That's correct, your Honor.

THE COURT: Thank you. Based on the parties' agreement and the absence of objection and my independent evaluation of the Sentencing Guidelines, I accept the guideline calculation in the PSR.

Accordingly, using the November 1, 2014 edition of the Sentencing Guidelines, I find that the offense level is 10. Criminal History Category is II. And the guideline range is 8 to 14 months.

In the plea agreement both parties also agreed not to seek a departure from the guideline sentence. We'll talk about variance in a moment. But just with respect to departure do I have that correct?

MR. OSUNA: Yes, your Honor.

THE COURT: Nevertheless I have considered whether there's an appropriate basis for departure from the advisory range within the guideline system and the Court does not find any grounds warranting a departure under the guidelines.

So with that, I'm happy to hear statements from counsel.

Mr. Osuna.

MR. OSUNA: Thank you, very much, your Honor.

You know, when I met Mr. Cepeda and he relayed to me his life story --

THE COURT: I'm sorry. I apologize. I want -- I always want to give defendant counsel a second opportunity to respond so I said Mr. Osuna but I actually met Ms. Castellano.

MS. CASTELLANO: I don't have anything to add to our March 3 letter.

THE COURT: Go ahead, Mr. Osuna.

MR. OSUNA: Thank you, your Honor.

THE COURT: My apologizes.

MR. OSUNA: When Mr. Cepeda relayed to me his story that he was brought to this country as a very young child and always thought that he was a United States citizen up until he reached age 18 and asked his mom for his paper work in order to get a job. I really identified with that because myself I'm the child of first -- first generation American. My parents were naturalized citizens, but we spoke Spanish at home. When I was a little kid, I used to ask them: Are you sure I'm a citizen? Are you sure? They would say: Why do you keep asking that? I was like because I would see the television and see the things that people were really going through. And, obviously, when I reached adulthood, and of course I'm comfortable I'm a citizen, but as a child when you grow up with immigrant parents you always have this nagging thought in the back of your head. And I thought I was crazy thinking that until I met Mr. Cepeda. I was like holy smoke, all those years you had that in your head. And here is an individual going through just that.

And when he told me his circumstance, he was sitting at the MCC, the little counsel booth, he told me he was born to an eleven-year-old mother and his father was a convicted murderer. And I was like wow, I thought I'd heard everything.

I really did. Because you do this 20 years you really do hear a lot of stories. That was a first. I hadn't heard that. I hadn't heard someone being born to a child who was the victim of a heinous crime by a guy who is serving a sentence for murder.

We spoke a lot more. We spoke about the circumstances that brought him here. We spoke about accepting responsibility. And we spoke about going forward, and what we would need to do to go forward. I had extensive conversations with Mr. Kamaraju, who is not here today, who really took into consideration a presentence memorandum that I submitted to the government that would allow my client to plead guilty in a way that would allow him at least a fighting chance in front of immigration later on.

I'll be very honest with the Court. If I walk out of here with a sentence of 365 days or more, that's an aggravated felony, and he's automatically removed from this country. That's it. I'm not going to sugarcoat it. I'm not going to lie. I'm not going to be cute. I need a sentence today of less than 364 days. That will allow Mr. Cepeda to end up standing in front of an immigration judge at 201 Varick Street where they will consider whether eligible, whether he qualifies -- we know he's eligible, but whether he merits cancellation of removal. The judges there are very attuned. Judge Page, Judge Videla, they're very attuned, they're very fair. And I trust in their judgment as to Mr. Cepeda, that they'll do the right decision. The family has told me that they don't have the financial means to hire an attorney there. I spoke to his mom. She has retained The Immigrant Defense Project that would represent him in Immigration Court should he remain eligible for cancellation of removal. I told the mother, of course, I would work with them in any way possible to give them the information that they would need at 201 Varick to make that determination.

I ask the Court to consider, as the government and Mr. Kamaraju certainly did, that his fraud here was for food stamps. It wasn't for people buying watches. I started off as a prosecutor in Bronx County. We used to get these night arraignments of these women who were shoplifting Similac. I was like good grief, we're locking these people up for stealing babyfood. I get it. It's a crime. But as a human being I have to take recognition of that.

In this case we have a young guy who was stealing food stamps. Food. So I ask the Court in sentencing him to consider that it is a fraud. It is a crime. For which he's accepted responsibility. But it's not a crime of greed. It's not a crime of excess. It's a crime of -- I don't even have the words for it.

I know he's assessed guideline points for criminal history. I did look carefully. And none of those sentences are for criminal convictions. They are all violations. Under New York law he doesn't have any convictions. There's two possessions of marijuana violations and there's a disorderly conduct. So under New York law he has no convictions at all. This will be his first conviction.

Under the guidelines a sentence assesses points. So whether it's a sentence for a violation, a sentence assesses points. But he has no criminal convictions, Judge.

He does have a great deal of family support. See all the folks here. There's his wife, of course. His aunts. His aunts are the ones who raised him because he couldn't let his mother raise him. They couldn't. She was a child herself. One of his aunts is here. Her name is Annette Sanchez. And she was speaking to me outside and explained to me how close he is with his cousin. She has a special needs son who is 21 years old. She was telling me how my client would bring him out to McDonald's, would help him in his activities of daily living. She assures the Court that were my client be able to -- deal with that process with Immigration Court, but if he does have a future in this country, that that's probably what he is going to go back to do. She's very close with him. She can provide him a job. She has a real estate office. She indicated that he has helped her in the past showing apartments.

Your Honor, I would ask the Court to sentence him --

it's very rare that we're in agreement; the government, probation, and defense counsel. Normally a big fight at the sentence. This is one of the rare cases where we're all in agreement. The government, I really thank them. I thank Ms. Castellano, certainly Mr. Kamaraju, that allowed my client to plead guilty in a manner that would allow him a fighting chance across the street.

I would ask the Court to impose an eight-month sentence, which is actually -- today he would have served eight months. But I would ask the Court to impose that sentence. And if the Court would not be inclined, I'm going to ask the Court do not go above 364 days. I would like my client to have the chance to work with The Immigrant Defense Project and at least be eligible for a fighting chance at immigration.

Thank you very much, your Honor.

THE COURT: Thank you, Mr. Osuna.

Mr. Cepeda, you don't have to make a statement but if you'd like to you may do so now.

THE DEFENDANT: Your Honor --

THE COURT: Just ask you to pull up the microphone and take your time, sir.

THE DEFENDANT: I would like to apologize to my wife, who is here, helped me go through this with my child without my support. I would like to thank the government for giving me this plea agreement. And I just apologize. I'm sorry.

THE COURT: Thank you, Mr. Cepeda.

Counsel, is there any reason why sentence cannot be imposed at this time?

MR. OSUNA: No, your Honor.

MS. CASTELLANO: No, your Honor.

THE COURT: As I have stated the guideline range applicable to this case is 8 to 14 months imprisonment.

Under the Supreme Court's decision in Booker and it's progeny, the guideline range is only one factor that the Court must consider in deciding the appropriate sentence. The Court is also required to consider the other factors that are set forth in a statute called 18 U.S.C. Section 3553(a). These include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed education or vocational training, care, or other treatment. I'm to take into account the kinds of sentences available, the guidelines range, any pertinent policy statement, the need to avoid unwarranted sentence disparities, the need to provide restitution. I am also required to impose a sentence sufficient but no greater than necessary to comply with the purposes I've just described.

I have given substantial thought and attention to the appropriate sentence in this case in light of the Section 3553(a) factors and the appropriate purposes of sentencing as reflected in that statute. I'm not going to hide the ball here. I am going to sentence, I'll tell you upfront, I'm going to sentence Mr. Cepeda to eight months, which is the bottom of his guideline range.

I do think a guideline sentence is appropriate. Although, as Mr. Osuna said, Mr. Cepeda was stealing food in the sense of stealing food stamps, but it is a serious offense, the fraud that was committed here. It does damage to our welfare system, to our taxpayers. It takes away that food from those who are qualified. And I do believe incarceration is necessary given the seriousness of the offense. And Mr. Cepeda has now had several minor brushes with the law and I do think it's important for deterrence of both Mr. Cepeda and others to have an incarceratory sentence in light of this violation of the law.

That said, I am confident that Mr. Cepeda is not a dangerous criminal. He's not a violent person. He has faced truly enormous difficulties in his life. Moreover, he has accepted responsibility for his actions. He has the support of his family, and I appreciate your presence here today, many of you who made the effort to come to show that support. I know that you'll provide it to Mr. Cepeda upon his release.

He's using his time while incarcerated to better himself. I hope he continues on that productive path. And for all of these reasons, and taking into account the Section 3553(a) factors, a sentence at the bottom of the guideline range is clearly appropriate.

So I will now state formally the sentence I intend to impose. Mr. Cepeda, will you please rise.

It is the judgment of the Court that you be sentenced -- that you be sentenced to a term of eight months, to be followed by a period of one year of supervised release.

You may be seated.

During your term of supervised release the standard conditions of supervised release shall apply. In addition, you'll be subject to the following mandatory conditions. You shall not commit another federal, state, or local crime. You shall not illegally possess a controlled substance. You shall not possess a firearm or destructive device.

I will be imposing a special condition requiring drug treatment and testing. So I'm suspending the mandatory condition as a result of the special condition.

You shall cooperate in the collection of DNA as directed by the probation office.

In addition, you must meet the following special conditions. You'll provide the probation officer with access to any requested financial information. You shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

You will participate in a program approved by the United States probation office which may include testing to determine whether you've reverted to using drugs or abusing alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider as approved by the probation officer. You will be required to contribute to the costs of services rendered, copayment, in an amount determined by the probation officer based on the ability to pay or the availability of third party payment.

You are to report to the nearest probation office within 72 hours of release from custody.

You shall obey the immigration laws and comply with the directives of the immigration authorities.

And I do recommend that you be supervised in your district of residence.

I will waive the fine because I don't believe you have the ability to pay the fine or it will interfere with your restitution payments.

Ms. Castellano, restitution and forfeiture?

MS. CASTELLANO: Yes, your Honor. In the plea agreement the defendant admitted the forfeiture allegation in the amount of $4,810.79.

THE COURT: So is the government seeking both forfeiture and restitution?

MS. CASTELLANO: I have a proposed order of restitution, your Honor.

THE COURT: So for the same amount, same monies?

MS. CASTELLANO: Yes.

THE COURT: It is further the judgment of this Court that Mr. Cepeda pay restitution in the amount of $4,810.79. And you will make restitution in accordance with 18 U.S.C. Section 3663(a), payable to the Clerk of the U.S. District Court for disbursement to the New York City Department of Human Resources as is outlined on page 21 of the presentence report and in accordance with the installment payment plan contained on page 21 of the report. The requirement of interest under 18 U.S.C. section 3664(f)(3) will be waived in light of your financial circumstances as set forth in the report.

I'm imposing a mandatory special assessment of $100 which shall be due immediately.

And as reflected in the -- I'm sorry. Ms. Castellano, do I have a forfeiture order?

MS. CASTELLANO: I have one here. Your Honor, may I pass it up?

THE COURT: Yes.

This is the order of restitution, which I will sign.

Forfeiture was admitted at the time of the plea. The Court finds that the defendant is to forfeit to the United States 4,810.79 which represents the proceeds obtained directly or indirectly as a result of the criminal activity.

Ms. Castellano, is the government going to put in a forfeiture order as well?

MS. CASTELLANO: We weren't planning to do that, your Honor, but happy to do so if necessary.

THE COURT: I made the oral order and it's consistent with the admission of forfeiture. So I'll leave it to the government.

MS. CASTELLANO: Thank you, your Honor.

THE COURT: Does either counsel know of any legal reason why the sentence should not be imposed as stated?

MS. CASTELLANO: No, your Honor.

MR. OSUNA: No, your Honor.

THE COURT: Sentence as stated is imposed. I find the sentence is sufficient but not greater than necessary to satisfy the sentencing purposes I described earlier.

Mr. Cepeda, when you are released on supervised release you'll have the continuing guidance and support of the probation department. Take advantage of these resources as the people in probation are committed to helping you succeed. That said, I have to caution you that you must strictly comply with all of the conditions of your supervised release. If you are brought back before me for a violation of those conditions I may sentence you to another term of imprisonment. I'm confident that won't be the case. But do work with probation.

Any applications, Mr. Osuna, regarding --

MR. OSUNA: Judge, I've had this happen a few times before. Actually the --

THE COURT: When did you say -- how long has he been in?

MR. OSUNA: He actually has eight months in today. I had this happen in front of Judge Cedarbaum recently where my client was getting a sentence that was equal to time served and the marshals indicated to me that if they don't have an order that says actual time served, that then he goes back to jail and they have to calculate his time through Washington, which takes about four weeks. So they end up doing about another month in jail. What we did in front of Judge Cedarbaum was actually just handwrite an order. And she signed it right there. I did take the liberty of preparing an order, in the utmost of opiumism this morning, that says sentenced to eight months which is equal to time served. If you look at his presentence report, it indicates he was arrested on July 10. So today would be 239 days.

THE COURT: Ms. Castellano, do you have a view?

So if I were formally giving a time-served sentence I would sign an order so that he could be released. I've given an eight-month sentence. If the government agrees that that's time served -- usually it's left to BOP to do the calculation. What's the government's view?

MS. CASTELLANO: Your Honor, I haven't done the actual counting of the days but I think on Mr. Osuna's -- taking Mr. Osuna, who has done that, I think the government is fine with that.

THE COURT: So I'll sentence him to eight months and indicate that that is time served, and then I'll take the order.

MR. OSUNA: Very well, your Honor. I'm just going to show a copy to the government.

THE COURT: Okay.

MR. OSUNA: May I hand up a copy to the Court?

THE COURT: You may.

Ms. Castellano, are there remaining counts and underlying indictments to be dismissed at this time?

MS. CASTELLANO: Yes, your Honor. The government moves to dismiss Counts One, Three, and Four of the indictment.

THE COURT: They are dismissed. Thank you.

Consistent with this. The order reads, "It's hereby ordered that Mr. Cepeda is sentenced to eight months incarceration for the instant indictment and that as of today the sentence is equal to time served, which I am signing. I'll get my deputy to make copies, please.

With that, counsel is there anything else?

Mr. Cepeda, I see no basis for an appeal but I'm required to inform all defendants of their appellate rights. To the extent that you've not given up your right to appeal your conviction and sentence through your plea of guilty and the agreement that you entered into with the government in connection with that plea, you have the right to appeal. If you're unable to pay the costs of an appeal you may apply for leave to appeal in forma pauperis which means that you wouldn't have to pay the costs of an appeal. The notice of an appeal must be filed within 14 days of the judgment of conviction.

Counsel, is there anything else I can address at this time?

MR. OSUNA: No, your Honor. Thank you very much.

MS. CASTELLANO: No, your Honor.

THE COURT: Good luck to you Mr. Cepeda. We're adjourned.

(Adjourned)